Case No. F3284(C)

REMARKS

Applicants wish to thank the Examiner for reviewing the present patent application. Applicants will consider canceling non-elected claim 19 upon an indication that the elected claims are in condition for allowance.

I. Premature Final Rejection

Applicants submit that U.S. Patent No. 5,135,137 to Rudnick has now first been made of record; therefore, the Final Rejection is premature. Applicants request that the present rejection be made non-final and that the finality of the same be withdrawn.

II. Rejection Under 35 USC §102(b)

The Examiner has rejected claims 1, 3, 5- 8, 15 and 16 under 35 USC §102(b) as being anticipated by Frutin, WO 98/36671 (hereinafter, '671) as evidenced by Rudnick, U.S. Patent No. 5,135,137 (hereinafter, '137). In the rejection, the Examiner mentions, in summary, that the '671 reference describes a frothed beverage that includes a sparingly soluble effervescent inducing gas. The Examiner continues by believing that the claimed pressure of the present beverage product is shown in the '671 reference and that the pressure is sufficient to cause the beverage to be discharged into the mouth of the consumer. The Examiner further mentions that the recitation characterizing the valve as "..., one which is designed to be opened via the consumer's mouth" is an intended manner of operating that does not further limit a device. Finally, the Examiner continues by relying on the '137 reference (for a first time) for showing a tilt valve design that can be used with a consumer's mouth or finger. In view of the above, and

notwithstanding the fact that the Examiner has relied on two (2) references, the Examiner believes that the novelty rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record on many occasions, the invention of claim 1 is directed to a beverage product comprising a dispenser and beverage in which the dispenser has a container for holding the beverage and a valve which is bias to a position where it seals the container, but which is operable to enable the beverage to be dispensed from the container and in which the beverage is a liquid having a sparingly soluble effervescence inducing gas dissolved therein, the beverage product being characterized in that the beverage is held under a gaseous pressure in the head space above the liquid beverage in the container that is sufficient to cause the beverage to be discharged directly into the consumer's mouth from the dispenser as an effervescent fluid when the valve is opened wherein the beverage is held under a gaseous pressure in the head space of at least 2.5 atmospheres at 5-15°C and the valve is one which is designed to be opened via the consumer's mouth.

The invention of claim 1 is further defined by the dependent claims which claim, among other things, the type of sparingly soluble effervescent inducing gas, the amount of liquid beverage and effervescence inducing gas, that the valve may be aerosol, that the head space within the container comprises between 10% and 80% of the volume of the container and that the beverage product includes a means for preventing an opening of the valve when the dispenser is inverted.

In contrast, and as already made of record, the '671 reference is directed to a method of producing a frothed liquid, like a milk shake or whipped cream. A frothed liquid is one which is foam-like. In the '671 reference (looking at, for example, Figure 1) a container having a liquid 18 is fitted with a straw 20 and a device 24 to keep the straw afloat. The contents in the container or bottle are pressurized through a cap 16 via a one way valve in the cap. The consumer is asked to shake the contents so that gas may be dissolved with the liquid and then to remove the cap to consume the contents through the straw 20. Turning to, for example, Figures 12 and 13, the '671 reference merely describes a device having a serrated nozzle 310 for discharging whip cream pressurized with nitrous oxide. The serrated nozzle would injure the consumer's mouth, tongue, gum and/or lips if the consumer attempted to place the serrated nozzle in his or her mouth.

Again, nothing whatsoever in the '671 reference even remotely suggests the discharge of a liquid beverage from a container directly into the mouth of a consumer from a dispenser wherein the liquid is an effervescent fluid. The liquid being discharged directly into the mouth of the consumer, as set forth in the claimed invention, is held under a gaseous pressure. The '671 reference clearly describes a bottle or container that has to be opened to the atmosphere before a beverage or liquid may be consumed into the mouth of a consumer. Moreover, the beverage or liquid consumed via the bottle described in the '671 reference requires negative pressure (i.e., the suckling effect of the consumer) in order to draw the liquid from the bottle.

The Examiner maintains that the '671 reference describes a "tilt valve" which can be opened via the consumer's mouth. Applicants, again, wish to point out that the tilt

valve in the '671 reference is serrated with sharp notches or teeth (please see 310, at Figure 4). Inserting such a nozzle into the mouth would, again, certainly cause injury and certainly is not designed for the consumer's mouth.

Turning to what appears to be a secondary reference in a novelty rejection, the '137 reference merely describes a simplified micro-gravity pre-mix package. The package is designed for space where there is essentially no gravity. The reference does not disclose the use of a sparingly soluble gas, and in fact, the package described has a gas in a space to preserve the carbonation of the beverage in an internal bag.

The '137 reference cures none of the deficiencies of the '671 reference. Moreover, Applicants wish to point out that the language of claim 1 qualifies the valve as one designed to be opened by the consumer's mouth, and is not intended manner of operating language. The language defines the valve as one suitable to go in a person's mouth to open.

It is clear that all of the important and critical limitations set forth in the presently claimed invention are not found in the combination of the '671 and '837 references, and it is improper for the Examiner to ignore the specific claim limitations. Therefore, Applicants, again, respectfully request that the novelty rejection be withdrawn and rendered moot.

II. Rejection Under 35 USC §103

The Examiner has again rejected claims 12 and 13 under 35 USC §103 as being unpatentable over Frutin, WO 98/36671 (hereinafter, '671) as evidenced by Rudnick, U.S. Patent No. 5,135,137 (hereinafter, '137) and applied to claims 1, 3, 5-8, 15 and 16, further in view of Kohler et al., U.S. Patent No. 5,143,288 (hereinafter, '288). In the rejection, the Examiner maintains, in summary, that the '671 reference describes an aerosol valve in a container but fails to show a dip tube as claimed. The '288 reference is relied on for describing aerosol valves for a container having a liquid and a dip tube in a nitrogen system. In view of this, the Examiner believes that the obviousness rejection should be maintained and is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record on numerous occasions, the present invention is directed to a beverage product having a dispenser and a beverage therein whereby the beverage is held under gaseous pressure and discharged with a sparingly soluble effervescence inducing gas dissolved therein and directly into the mouth of a consumer when a valve is opened via the consumer's mouth. Claims 12 and 13 further define the independent claim by the inclusion of a specific dip tube that has an aperture which communicates between the headspace above the beverage in the container and the interior of the dip tube to enable gas in the headspace to be entrained in fluid being dispensed through the dip tube when the valve is in the open position.

In contrast, and as already made of record, the '671 reference is directed to a method of producing a froth liquid. The contents in the container or bottle of the '671 reference is consumed by the consumer after the bottle or container has been opened to the atmosphere. The beverage or liquid consumed via the bottle described in the '671 reference requires negative pressure in order to draw liquid from a straw in the bottle. Nothing is consumed under pressure utilizing the bottle described in the '671 reference. The '137 reference, again, is directed to a micro-gravity pre-mix package. The '288 reference does not cure any of the vast deficiencies of the '671 reference (and its combination with the '137 reference) because the '288 reference is merely directed to an apparatus to produce and maintain an effective aerosol spray. One would not combine the teachings associated with an aerosol spray with that of a container that is to be opened prior to the consumption of a beverage. The apparatus described in the '288 reference, in fact, looks like a can for deodorants. Thus, the Examiner has not established a *prima facie* case of obviousness as required under 35 USC §103 and it is respectfully requested that such rejection be withdrawn and rendered moot.

III. Rejection Under 35 USC §103

The Examiner has again rejected claim 14 under 35 USC §103 as being unpatentable over Frutin, WO 98/36671 (hereinafter '671) in view of Kohler et al, U.S. Patent No. 5,143,288 (hereinafter '288) as applied to claims 12 and 13 above and further in view of Berg et al., U.S. Patent No. 3,947,567 (hereinafter '567). In the rejection, the Examiner continues to mention, in summary, that the '671 reference teaches an amount of gas discharged with a liquid when the effervescent beverage is expelled. The

Examiner admits that the '671 reference is silent in teaching any particular amount of gas discharged with a liquid but relies on the '567 reference for allegedly explaining a particular desired degree of effervescence for products. Thus, the Examiner believes that the obviousness rejection should be maintained and is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicants' position, again, that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

Again, and as already made of record, the present invention is directed to a beverage product having a dispenser and a beverage, the beverage being discharged under pressure directly into the mouth of a consumer with a valve that can be opened via the consumer's mouth. The beverage is one which has a sparingly soluble effervescence inducing gas dissolved therein. Claim 14 further defines the invention by identifying a quantity of gas expelled from the beverage container when the valve is opened.

In contrast, and again, the '671 reference is merely directed to a bottle or container that has to be opened to the atmosphere before a beverage or liquid may be consumed. The '288 reference is directed to an aerosol can and does not cure any of the deficiencies of the '671 reference. Aerosol sprays are not suitable for discharging directly into the mouth of a consumer. The '567 reference, on the other hand, does not cure any of the vast deficiencies of the '671 reference since the '567 reference is merely directed to effervescent cleaners, including mouthwash. There is no motivation whatsoever to combine teachings which suggest consuming a beverage by opening a container to the atmosphere with references that are directed to aerosol cans and effervescent cleaners. In view of this, it is clear that the Examiner has not established a

prima facie case of obviousness as required under 35 USC §103. Applicants, therefore, respectfully request that the obviousness rejection be withdrawn and rendered moot.

IV. Rejection Under 35 USC §103

The Examiner has maintained the rejection of claims 17 and 18 under 35 USC §103 as being unpatentable over Frutin, WO 98/36671 (hereinafter '671) as applied to claims 1, 3, 5-8, 15, 16 further in view of Frutin, WO 97/21605 (hereinafter '605). In the rejection, the Examiner maintains, in summary, that the '671 reference teaches a container that may be fitted with a device which injects flavor into the container and that the '605 reference teaches a container having a supplemental compartment with sparingly soluble effervescent inducing gas and a liquid that releases the contents upon opening the container while relieving the pressure within the container. In view of this, the Examiner again believes that it would be obvious to modify the '671 reference and to include a widget for releasing the gas and a flavor when a valve is opened. Thus, the Examiner maintains that the obviousness rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the '671 reference requires that a bottle or container be opened to the atmosphere before a beverage or liquid may be consumed into the mouth of a consumer. The '605 reference, on the other hand, merely discloses a device for releasing a fluid into a liquid already within a container. No combination whatsoever of the references relied on by the Examiner even remotely suggests a beverage product

comprising a dispenser and a beverage wherein the beverage is dispensed directly into the mouth of a consumer and held under gaseous pressure whereby a valve on the beverage product is opened via the consumer's mouth. Claims 17 and 18 further define the present invention by including a widget that contains concentrated flavor that is released into the container when the valve is opened. The '605 reference is designed to release fluid into a liquid. None of the important and critical limitations of the present invention are even remotely found in the combination of references relied on by the Examiner. A *prima facie* case of obviousness has not been established and it is respectfully requested, again, that the obviousness rejection be withdrawn and rendered moot.

V. Rejection Under 35 USC §103

The Examiner has maintained the rejection of claims 1, 4, 9 and 10 under 35 USC §103 as being unpatentable over Hoffman, U.S. Patent No. 5,747,079 (hereinafter, '079) in view of Denton et al., U.S. Patent No. 5,971,357 (hereinafter, '357). In the rejection, the Examiner mentions, in summary, that claims 1, 4, 9 and 10 of the present invention are taught by the '079 reference since the same shows an oxygenated beverage which is effervescent whereby the beverage can be tea, coffee, root beer or water held in a container at 2 to 6 atmospheres. The Examiner further mentions that the '079 reference shows that the oxygenated beverage can reduce or control halitosis and may be taken via ingestion or spraying which would involve a valve structure. The Examiner admits that the '079 reference is silent with respect to temperature at which the beverage is stored and that the valve structure is capable of being operated by a consumer's mouth. Nevertheless, the Examiner believes that the '357 reference cures the vast deficiencies of the '079 reference since he believes the latter describes an

actuator to open a valve that is shaped and positioned for engagement in a user's mouth or teeth to dispense when a person is required to keep both hands free to do something else. As to temperature, the Examiner believes that the '079 reference teaches an amount of oxygen dissolved at a given pressure and this depends on the particular temperature of the container and the amount of oxygen dissolved to set the ability of the beverage to control or eliminate halitosis. Thus, the Examiner believes, in view of the above, that the obviousness rejection is proper and warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the present invention is directed to a beverage product comprising a dispenser and a beverage in which the dispenser has a container for holding the beverage and a valve which is biased to a position where it seals the container but which is openable to enable the beverage to be dispensed from the container and in which the beverage is a liquid having a sparingly soluble effervescent inducing gas dissolved therein. The beverage product is characterized in that the beverage is held under a gaseous pressure in the headspace above the liquid beverage in the container that is sufficient to cause the beverage to be discharged directly into the mouth of a consumer from the dispenser as an effervescent fluid when the valve is open wherein the beverage is held under a gaseous pressure in the headspace of at least 2.5 atmospheres gauge at 5-15°C and the valve is one which is designed to be opened via the consumer's mouth.

The dependent claims further define the independent claim by claiming, for example, that the sparingly soluble effervescent inducing gas is oxygen, that the beverage is water or a tea or coffee based beverage, and that the beverage product can contain means that are engaged by the user's mouth or teeth to cause or enable release of liquid directly into the user's mouth. In contrast, and as already made of record, the '079 reference is directed to an oxygenated beverage useful to alleviate halitosis. The beverage of the '079 reference preferably has an ozonized oxygen. Frankly, the '079 reference is directed to a method for using solutions in remediating mouth odor. The vast deficiencies of the '079 reference are not cured by the '357 reference since the '357 reference is merely directed to a fluid delivery valve that can be used with liquids in laboratories, hospitals and with pilots or astronauts requiring nourishment whereby the same are typically required to wear protective suits and preferably have one or both hands free to do something other than take a drink of a beverage. It should be understood that the '079 reference does not disclose a beverage held under gaseous pressure in a headspace of at least 2.5 atmospheres gauge at 5-15°C and a dispenser including an actuator means being suitable to be positioned in a user's mouth to release beverage. It should be further noted that neither the teachings of the '079 reference or the '357 reference are directed to producing an effervescent beverage. Moreover, the valve described in the '357 reference wouldn't be expected to withstand the pressure of 2.5 bar and particularly because bracing member 47 would more than likely blow out of the housing 43 since the member is only held in place by friction. (please see column 4, lines 1-4 and lines 25-31).

In view of this, it is clear that the Examiner has not established a *prima facie* case of obviousness as required under 35 USC §103. Therefore, Applicants respectfully, again, request that the obviousness rejection be withdrawn and rendered moot.

VI. Rejection Under 35 USC §103

The Examiner has again rejected claim 11 under 35 USC §103 as being unpatentable over Hoffman, U.S. Patent No. 5,747,079 (hereinafter '079) in view of Denton et al., U.S. Patent No. 5,971,357 (hereinafter '357) as applied to claims 1, 4, 9 and 10 above and further in view of Bergman, SE 9801752 A (hereinafter '752A). The Examiner mentions that the '752A reference describes a water dispensing valve operated by biting and that the same additionally utilizes a button to control the amount of water dispensed based on the bite pressure applied to the button. In view of this, the Examiner maintains that it would have been obvious to modify the '079 reference to include a button on the bite valve since the '752A reference teaches a means of controlling the amount of dispensing by bite pressure. Thus, the Examiner believes that the obviousness rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicants' position, again, that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the present invention is directed to a beverage product comprising a dispenser and a beverage wherein the beverage is held under gaseous pressure and can be discharged directly into the mouth of a consumer when a valve on the beverage product is opened via the consumer's mouth. The invention is further defined by claim 11 which mentions that an actuator means of the beverage product can include a button mounted in an outlet portion such that the button can be moved by a biting action.

Again, the '079 reference is directed to a beverage product for controlling halitosis. The '357 reference is directed to a fluid delivery valve suitable to deliver nourishments to those typically required to wear protective suits and having a need to keep one or both hands free. The '752A reference is directed to a valve with a sleeve button so that animals can bite on the valve in order to release water. Such a mechanism appears to be the type found in a bird, dog or gerbil cage. There is no motivation whatsoever for modifying the teachings of the '079 reference which merely describe a beverage for controlling halitosis. This is true because an individual attempting to cure a halitosis problem normally does not have both hands occupied. Moreover, the sleeve button described in the '752A reference appears to have a spring mechanism for releasing water which is not typically under pressure. In view of this, the Examiner has not established a *prima facie* case of obviousness by combining the '079, '357, and '752A references. In view of this, Applicants respectfully request that the obviousness rejection be withdrawn and rendered moot.

Turning to the final remarks of the Examiner, again, the '671 reference discloses a method for producing a frothed liquid, like a milk shake or whipped cream. Disclosed is the use of a serrated nozzle. The bottle disclosed in the '671 reference is opened to the atmosphere before any beverage is consumed.

Gruenwald, U.S. Patent No. 4,993,599 does not appear to be relied on by the Examiner as a 102 or 103 reference, and therefore, it is unclear why the Examiner has addressed the same.

Applicants submit that all claims of record are now in condition for allowance. Reconsideration and favorable action are earnestly solicited.

Case No. F3284(C)

Applicants submit that all claims of record should be passed to issue.

Applicant further submit that this application is ready for appeal.

In the event the Examiner has any questions or concerns regarding the present patent application, he is kindly invited to contact the undersigned at his earliest convenience.

Respectfully submitted,

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